

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N LAMAR BLVD • BOX 4087 • AUSTIN, TEXAS 78773-0001

512/424-2000

www.dps.texas.gov



STEVEN C. McCRAW
DIRECTOR
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COMMISSION
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MANNY FLORES
A. CYNTHIA LEON
JASON K. PULLIAM
RANDY WATSON

March 6, 2019

Via Email

Mackenzie Farkus
68580-46999185@requests.muckrock.com

RE: Public Information Request for all emails on or related to the Uniform Crime Reporting Audit of the Austin Police Department (PIR # 19-0618)

Ms. Farkus:

The Department received your above-referenced request on February 7, 2019 and the clarification of your request on February 20, 2019. The Department has located records responsive to your request; however, we believe some or all of the records may be excepted from required public disclosure at this time. We are seeking a ruling from the attorney general's office with respect to disclosure of these records, and a copy of our request letter is enclosed. We have also referred your request to an affected third party - the City of Austin - to allow that third party an opportunity to assert arguments related to the disclosure of the records. You will be notified directly by the attorney general's office when a ruling is issued.

If you have any questions regarding this request, please submit them in writing via facsimile to (512) 424-5716, via email to OGC.Webmaster@dps.texas.gov, via mail to the address in the letterhead, or in person at our offices at 5805 N. Lamar Blvd. in Austin. Thank you.

Cordially,

A handwritten signature in black ink that reads "ML Calcote".

ML Calcote
Assistant General Counsel

cc: Attorney General of Texas
Open Records Division
209 West 14th Street, 6th Floor
Austin, Texas 78701

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March 6, 2019

Via Hand Delivery

Attorney General of Texas
Open Records Division
209 West 14th Street, 6th Floor
Austin, Texas 78701

RE: Public Information Request for all emails on or related to the Uniform Crime Reporting Audit of the Austin Police Department (PIR # 19-0618)

DATE REQUEST FOR INFORMATION RECEIVED:

2/20/2019

DATE REQUEST FOR RULING SUBMITTED TO ATTORNEY GENERAL:

3/6/2019

Dear Open Records Division:

The Department of Public Safety received the above-referenced request for information from Mackenzie Farkus on February 20, 2019. We believe some or all of the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. Accordingly, we are requesting a ruling regarding the release of these records. In addition, we believe the request implicates the interests of the City of Austin Police Department (APD). Accordingly, we have notified APD of the request for information and their right to submit arguments to your office as to why the submitted information should not be released. See Government Code Section 552.305.

Attorney-Client Privilege

Section 552.101 of the Government Code states that “[i]nformation is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Rule 503(b)(1) of the Texas Rules of Evidence provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer

- representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must:

- (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication;
- (2) identify the parties involved in the communication; and
- (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client.

Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Information coming within the attorney-client privilege is protected by section 552.107(1) of the Government Code. In Attorney General Decision ORD No. 676, your office held that a governmental entity asserting attorney-client privilege has the burden of demonstrating the elements of the privilege. First, the governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Tex. R. Evid. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A)-(E). Finally, the attorney-client privilege applies only to a confidential communication. *Id.* 503(b)(1).

The marked records constitute communications between attorneys for the Department and employees of the Department. The communications were made for the purpose of facilitating the rendition of professional legal services to the Department, and all of the marked entries were discussed and communicated between the attorneys and their clients. The communications were not intended to be disclosed, nor have they been disclosed, to third parties. Accordingly, the marked portions of the submitted records must be withheld under Rule 503 of the Texas Rules of Evidence and section 552.107.

Audit Working Papers

The marked records consist of communications regarding an audit of the Austin Police Department’s Uniform Crime Reporting. A copy of the completed audit report has been made public. However, the Department believes the requested communications include information in

both the body of the emails and attachments that consist of working papers connected with the audit that are excepted from required public disclosure pursuant to section 552.116 of the Government Code. This section provides, in pertinent part:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency ... including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.
- (b) In this section:
 - (1) "Audit" means an audit authorized or required by a statute of this state or the United States ... and includes an investigation.
 - (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
 - (A) intra-agency and interagency communications; and
 - (B) drafts of the audit report or portions of those drafts.

The audit at issue was conducted pursuant to section 411.054 of the Government Code and 37 TAC Sec. 27.121. The working papers consist of inspectors' notes, which were used to draft the audit reports. Accordingly, the Department believes the requested information should be excepted from required public disclosure pursuant to section 552.116.

Deliberative Process

Section 552.111 states that "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021." Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615* at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S. W.2d 391, 394 (Tex. App.-San Antonio 1982, orig. proceeding); *Open Records Decision No. 538* at 1-2 (1990).

Your office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See Open Records Decision No. 559* at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

In *Open Records Decision No. 615*, your office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.-Austin 1992, orig. proceeding). Your office determined section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations,

and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.-Austin 2001, no pet); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The marked records consist of drafts of documents and communications among Department staff and between Department staff and employees of the APD regarding gathering data that was ultimately the subject of the final audit report. The content of those communications between and among APD employees and the Department represent communications by those employees in their policy-making capacities. These records reflect the discussions and thought processes by and among Department personnel and APD personnel in developing these documents and policies. As stated previously, the final UCR audit was released to the public in its final form. Therefore, the Department believes the marked records are excepted from disclosure under section 552.111 of the Government Code.

Please find enclosed the request from Mackenzie Farkus, the notice of our request for a ruling sent to the requestor, a copy of the third party notice provided to APD, and the responsive records we wish to except from required disclosure. Please feel free to contact me at (512) 424-2890 if you have any questions.

Sincerely,



ML Calcote
Assistant General Counsel

Enclosure(s)

cc: Mackenzie Farkus
68580-46999185@requests.muckrock.com
w/o enclosures

Cary Grace
City of Austin Attorney's Office
cary.grace@austintexas.gov
w/o enclosures

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A. CYNTHIA LEON
JASON K. PULLIAM
RANDY WATSON

March 6, 2019

Via Email and First Class Mail

Cary Grace
Assistant City Attorney - City of Austin
301 W. 2nd Street
Austin, Texas 78701
Cary.grace@austintexas.gov

RE: Public Information Request received by DPS for certain communications related to the Uniform Crime Reporting Audit of the Austin Police Department

Ms. Grace:

The Department of Public Safety has received a formal request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include communications to or from the Austin Police Department as well as internal Department communications regarding an audit of the Austin Police Department. The Office of the Attorney General is reviewing this matter, and they will issue a decision on whether Texas law requires us to release your records. Generally, the Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the attorney general, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so not later than the tenth business day after the date you receive this notice.**

If you submit arguments to the attorney general, you must:

- a) identify the legal exceptions that apply,
- b) identify the specific parts of each document that are covered by each exception, and
- c) explain why each exception applies. Gov't Code §552.305(d).

A claim that an exception applies without further explanation will not suffice. (Attorney General Opinion H-436). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 working days.

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code §552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code §552.305(e).

Commonly Raised Exceptions

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.103: Information related to litigation involving the state or a political subdivision

Section 552.108: Information held by a law enforcement agency or prosecutor that deals with the detection, investigation or prosecution of crime

Section 552.110: Confidentiality of Trade Secrets and Commercial or Financial Information

Trade Secrets:

In re Bass, 113 S.W.3d 735 (Tex. 2003).

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).

Open Records Decision No. 552 (1990).

Commercial or Financial Information:

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110), abrogated by *In re Bass*, 113 S.W.3d 735 (Tex. 2003).

Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Open Records Decision No. 639 (1996).
Open Records Decision No. 661

Section 552.111: Agency Memoranda

Section 552.131: Confidentiality of Certain Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the Public Information Handbook published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To obtain copies of the *Public Information Handbook* or Attorney General Opinions, including those listed above, please visit the attorney general's website at <http://www.texasattorneygeneral.gov>.

Sincerely,

ML Calcote

ML Calcote
Assistant General Counsel
Office of General Counsel

Enclosure: Copy of request for information

cc: Office of the Attorney General
 Open Records Division
 P.O. Box 12548
 Austin, Texas 78711-2548
 (w/o enclosures)

Requestor (w/o enclosures)

Mackenzie Farkus
68580-46999185@requests.muckrock.com